

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SERGIO TORRES,

Petitioner,

v.

ACTING WARDEN,

Respondent.

No. 1:20-cv-01001-JLT-BAK (EPG) (HC)

ORDER DIRECTING CLERK OF COURT
TO FILE FIRST AMENDED PETITION

(ECF No. 11)

ORDER TO SHOW CAUSE WHY FIRST
AMENDED PETITION SHOULD NOT BE
DISMISSED AS UNTIMELY

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

I.

BACKGROUND

On June 25, 2020, Petitioner filed a federal petition for writ of habeas corpus in the United States District Court for the Central District of California. (ECF No. 1). On July 21, 2020, the petition was transferred to the Eastern District. (ECF No. 5). On August 4, 2020, the Court conducted a preliminary review of the petition, found that it failed to present any cognizable grounds for relief, and dismissed the petition with leave to file an amended petition. On August 24, 2020, Petitioner filed what appeared to be an opposition to a motion to dismiss, which the Court disregarded. (ECF Nos. 8, 12). On October 26, 2020, the Court dismissed this action for

1 failure to comply with court orders and failure to prosecute in light of Petitioner’s alleged failure
2 to file a first amended petition. (ECF Nos. 14, 16).

3 On February 1, 2022, the Ninth Circuit Court of Appeals granted a certificate of
4 appealability as to “whether the district court properly dismissed appellant’s habeas proceedings
5 for failure to prosecute after concluding appellant had not filed an amended 28 U.S.C. § 2254
6 petition, in light of appellant’s submission to the district court on August 24, 2020 that included,
7 at pages 26–31, a copy of the requested amended § 2254 petition.” (ECF No. 16 at 1). On March
8 17, 2022, the Ninth Circuit vacated the judgment and remanded for further proceedings. (ECF
9 No. 27).

10 II.

11 DISCUSSION

12 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a
13 habeas petition and allows a district court to dismiss a petition before the respondent is ordered
14 to file a response, if it “plainly appears from the petition and any attached exhibits that the
15 petitioner is not entitled to relief in the district court.” Rule 4, Rules Governing Section 2254
16 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

17 In light of the Ninth Circuit’s remand, the Court will conduct a preliminary review of the
18 first amended petition (“FAP”). (ECF No. 11). The FAP is difficult to comprehend. Based on
19 what the Court is able to decipher, it appears that Petitioner challenges the sentencing
20 enhancements imposed by the Merced County Superior Court for Petitioner’s 1998 escaping
21 from court without force conviction on the grounds of double jeopardy, prosecutorial error, and
22 ineffective assistance of counsel. (*Id.* at 26, 29–30). Petitioner was sentenced to an indeterminate
23 imprisonment term of twenty-six years to life. (*Id.* at 26). In support of his claims, Petitioner
24 cites to Cunningham v. California, 549 U.S. 270 (2007), Blakely v. Washington, 542 U.S. 296
25 (2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000). (ECF No. 11 at 7).

26 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
27 of 1996 (“AEDPA”). AEDPA imposes various requirements on all petitions for writ of habeas
28 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v.

Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). The instant petition was filed after the enactment of AEDPA and is therefore governed by its provisions. AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1).

Section 2244(d) provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

In most cases, the limitation period begins running on the date that the petitioner’s direct review became final as set forth in 28 U.S.C. § 2244(d)(1)(A). Here, Petitioner does not provide enough information to determine when direct review of his conviction became final, but the instant petition was filed twenty-four years after Petitioner was convicted in 1998. Accordingly, the instant federal petition is untimely unless Petitioner establishes that he is entitled to a later commencement of the limitation period or that statutory and/or equitable tolling is warranted.

The “time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward” the one-year limitation period. 28 U.S.C. § 2244(d)(2). The limitation period also is subject to equitable tolling if the petitioner demonstrates ““(1) that he has been pursuing his

rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). Although Petitioner states in conclusory fashion that he is entitled to equitable tolling, (ECF No. 11 at 2, 4), Petitioner does not provide any factual allegations regarding how he has been pursuing his rights diligently and what extraordinary circumstance stood in his way and prevented timely filing. Petitioner bears the burden of alleging facts that would give rise to tolling. Holland, 560 U.S. at 649; Pace, 544 U.S. at 418.

III.

ORDER

Accordingly, the Court HEREBY ORDERS that:

1. The Clerk of Court is DIRECTED to file Document No. 11 as the First Amended Petition; and
2. Within **THIRTY (30) days** from the date of service of this order, Petitioner SHALL SHOW CAUSE why the petition should not be dismissed as untimely.

Petitioner is forewarned that failure to follow this order may result in a recommendation for dismissal of the petition pursuant to Federal Rule of Civil Procedure 41(b) (a petitioner's failure to prosecute or to comply with a court order may result in a dismissal of the action).

IT IS SO ORDERED.

Dated: **July 7, 2022**

/s/ Eric P. Grogan
UNITED STATES MAGISTRATE JUDGE